Volair Contractors, Inc. *and* Plumbers & Pipefitters Local Union 74, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S.A. and Canada. Cases 4–CA–27432 and 4–CA–27028

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 29, 1999, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified.[3]

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Melvin Baldwin and laying off Louis Oliver because of their union activities, and that it violated Section 8(a)(1) by interrogating and making certain coercive statements to these and other employees concerning those activities. The judge found that the Respondent unlawfully discharged Baldwin, but recommended that the other allegations be dismissed. He also refused to find that the Respondent's failure to recall Oliver was unlawful, because it was not alleged in the complaint to violate the Act. We adopt the judge's conclusions on these issues.

Although we are in essential agreement with the judge's findings and conclusions, we find it necessary to more fully explain our rationale on several issues. Thus, we find, for the reasons stated by the judge, but also for reasons explained below, that Baldwin was a statutory employee and not a supervisor at the time of his discharge; that the Respondent did not unlawfully interrogate Baldwin;[4] and that Baldwin's discharge was unlawful but Oliver's layoff was not. We also agree with the judge, for the reasons stated in his decision, that the Respondent did not unlawfully interrogate employee John Cabral pursuant to an unfair labor practice charge arising from Oliver's layoff.[5] Finally, we find that the judge did not abuse his discretion by declining to find that the Respondent unlawfully refused to recall Oliver.[6]

I. BALDWIN ALLEGATIONS

A. Factual Background

The Respondent hired Melvin Baldwin, a pipefitter/welder, in November 1997 to be the foreman of a crew assembling and installing new boilers in the Wanamaker building in Wilmington, Delaware. Baldwin reported directly to the Respondent's outside superintendent, Joseph Tigue, who was overseeing several projects for the Respondent. Baldwin was issued a cell phone so that he could contact Tigue, who was frequently absent from the jobsite. Baldwin also ordered supplies for the job and had authority to recommend that his crew work overtime, although he could not require them to do so without authorization from higher management.

In the course of his work on the Wanamaker project, Baldwin asked Tigue for additional manpower and, at

[1] The General Counsel's reply brief was rejected as untimely.

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to be consistent with our decision in *Ferguson Electric Co.*, 335 NLRB 142, 143 (2001), and to substitute standard language for other portions of the judge's Order. Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 177 (2001).

[4] We disagree, however, with the judge's finding that the General Counsel abandoned this allegation and address the issue on its merits.

[5] In this regard, we agree with the judge that the questioning was not coercive merely because the Respondent did not furnish all the safeguards prescribed in *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964), enf. denied on other grounds, 344 F.2d 617, 619 (8th Cir. 1965). In adopting this conclusion, we observe that, under certain circumstances, even questions having no express connection with employees' protected activity or Board charges may be coercive, triggering the need for *Johnnie's Poultry* safeguards. For example, employees who participate in open protected activity with a coworker (or know of such activity) may infer that the employer's subsequent discharge of and questions about the coworker relate to the protected activity, even if such activity or the filing of a Board charge is never mentioned. See, e.g., *Parkwood Chevrolet*, 262 NLRB 256, 265 (1982). Here, however, as the judge found, there is no evidence that the questioned employee, John Cabral, had any knowledge of Oliver's union affiliation or the Union's charge. Moreover, Cabral had previously complained to management after having a fight with Oliver and, thus, would reasonably have believed that Tigue's request for a statement that Oliver was a "troublemaker" referred to that incident rather than relating to Sec. 7 rights.

[6] The General Counsel raised this issue for the first time in his brief in support of exceptions. The Board has rejected as untimely motions to amend the complaint made for the first time in exceptions. See *United States Service Industries*, 324 NLRB 834, 835 fn. 10 (1997).

Tigue's request, recommended several workers who had the necessary skills for the job. Tigue subsequently interviewed the recommended individuals by telephone and hired them. Baldwin also complained to Tigue about the quality of some of his workers and was told, "If you don't like them, get rid of them."

Baldwin completed the Wanamaker project in late December or early January 1998, several weeks after the scheduled project deadline. The Respondent then assigned him to work in its fabrication shop, preparing piping to be installed at the Laird campus of the University of Delaware. On this job, Baldwin reported to the project superintendent, Charles Wertz, who was a level below Tigue in the Respondent's management hierarchy. Baldwin worked with two other welders, assigning them tasks based on a blueprint given to him by Wertz, and administered a welding certification test to welder John Cabral at Wertz's request.

In February 1998, Baldwin began to install the piping in cooling towers at the Laird site as part of a four-man crew. He spent much of his time doing hands–on work and was responsible for correcting the work of other crewmembers. He continued to report to Wertz, who was on site 80 percent of the time. The installation of pipe in the cooling towers was completed on March 20, 3 weeks behind schedule. Thereafter, the Respondent began installing pipe in other areas, with several additional crews, and Baldwin was at times consulted about the allocation of the work force.

Also in mid-March, Baldwin contacted the Union and signed an authorization card. A couple of other employees working on the Laird site were also known union members. Shortly after Baldwin signed his authorization card, he and union supporter Steve Tennet wore their union T-shirts to work. Wertz asked them why they were wearing union T-shirts. When Baldwin responded by asking whether he had anything against unions, Wertz stated that Baldwin didn't want to know his views on unions but that he could tell Baldwin stories about his experience with unions on other jobs. On a later occasion, Wertz commented to Baldwin, "What, no Union [T]-shirt today?"

On April 6, Baldwin took a welding test at the Union's headquarters and became a member of the Union. On April 7, Tigue came to the Laird jobsite and told Baldwin he was fired because he was not pushing his crew hard enough. Although Tigue was hiring pipefitters for the Laird project at the time, he did not consider retaining Baldwin as a rank-and-file pipefitter.

B. Analysis and Conclusions

1. Supervisory Status

Before addressing Baldwin's termination, the judge considered whether Baldwin was a statutory supervisor at the time of termination and thus unprotected by the Act. He found that Baldwin was a supervisor on the Wanamaker project, by virtue of the authority Tigue granted him to discharge unsatisfactory workers,[7] but that Baldwin ceased to be a supervisor when he began work on the Laird project under the supervision of Wertz. The Respondent excepts to the judge's conclusion on the grounds that Baldwin was never told that he had lost the authority Tigue granted him on the Wanamaker project, and that his subordination to Wertz on the Laird project did not establish that his status had changed. In addition, the Respondent argues that, in any event, Baldwin was a supervisor because he exercised independent judgment in assigning, directing, and disciplining his crew on the Laird project. We find no merit in the Respondent's exceptions.[8]

The burden of proving supervisory status is on the party alleging it exists, and "th[at] burden does not shift." *Chemical Solvents, Inc.*, 331 NLRB 706 fn. 3 (2000); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S 706 (2001). We adopt the judge's determination that Baldwin's subordination to Wertz when he moved to the Laird project was a significant change in his position that cast doubt on the continuation of his authority to fire workers and effectively recommend others for hire. Neither Wertz nor Tigue ever told Baldwin that he had such authority at the Laird project, as Tigue had told Baldwin when he worked on the Wanamaker project. In fact, the record indicates that, while Baldwin had discussed manpower issues, including hiring and firing, directly with Tigue on the Wanamaker job, Tigue discussed these matters with Wertz on the Laird project. There is no evidence that Baldwin recommended anyone for hire while working on the Laird project or was ever asked to do so,

[7] In addition to granting Baldwin firing authority, Tigue also asked Baldwin to recommend additional workers for the Wanamaker job and generally hired the workers he recommended after a brief telephone interview. Authority to effectively recommend both hiring and discharge may establish supervisory status. *Delta Carbonate*, 307 NLRB 118, 120 (1992), enfd. 898 F.2d 486 (3rd Cir. 1993) (shift leaders were statutory supervisors because they had authority to, inter alia, effectively recommend hiring, promotion, and discharge).

[8] The Respondent also argues that: Baldwin was hired as a foreman and was never told he had lost that title; his salary remained unchanged; he retained the cell phone that had been issued to him on the Wanamaker project; and he attended at least one supervisory meeting while on the Laird project. However, such secondary indicia of supervisory status cannot establish supervisory status in the absence of primary indicia. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

in spite of Respondent's need for pipefitters prior to Baldwin's discharge.[9] Thus, we agree with the judge that Respondent has presented insufficient evidence that Baldwin had hiring and firing authority on the Laird project.

The Respondent has not demonstrated that Baldwin was a supervisor by virtue of either his assignment of work to and direction of his crewmembers or his alleged disciplinary authority, because it failed to show that Baldwin exercised this authority using independent judgment, as required by Section 2(11), rather than in a routine manner. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997). Although Wertz affirmed, in response to a leading question by the Respondent's counsel, that Baldwin's direction of other crewmembers required him to use independent judgment, such "conclusionary statements made by witnesses in their testimony, without supporting evidence, do[] not establish supervisory authority." *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (citing *American Radiator Corp.*, 119 NLRB 1715, 1718 (1958)).

There is no record evidence that Baldwin's assignment or direction of his crew required independent judgment. Wertz testified that Baldwin's responsibilities on the Laird project were to set the job up, tell Wertz what he needed for manpower, assign different tasks to the crew, and lay out the job. But, Baldwin testified that he followed Wertz's instructions in laying out the job and assigned tasks to his crewmembers with reference to a blueprint provided by Wertz. Such circumscribed authority does not indicate the use of independent judgment. See *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234–1235 (1982) (leadmen who direct crews in accordance with instructions and floor plans furnished by employer do not exercise independent judgment necessary for supervisory status); see also *Electrical Specialties, Inc.*, 323 NLRB 705, 707 (1997) (leadmen who lay out work pursuant to general contractor's specifications not supervisors).[10]

The Respondent's reliance on Baldwin's alleged disciplinary authority while working on the Laird site is equally unavailing. The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified that they possessed and where its exercise was sporadic and infrequent. See *Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995), enfd. 101 F.3d 107 (2d Cir. 1996); see also *Tree-Free Fiber Co.*, 328 NLRB 389, 392-393 (1999) (citing *Greenspan D.D.S., P.C.*, for the proposition that, "[w]hen an individual has not been notified, orally or in writing, that he is vested with a supervisory power, the frequency of exercise of the authority is relevant to a determination of whether in fact the authority has been delegated to him by management"). Here, Wertz summarily testified that Baldwin had the authority to discipline on the Laird project and Tigue testified that Baldwin had such authority on the Wanamaker project and retained it on the Laird project. However, neither Wertz nor Tigue testified that they informed Baldwin of his alleged disciplinary authority.[11] And Baldwin testified without contradiction that he had never disciplined anyone or written anyone up on either the Laird or Wanamaker projects and explained that "I never discussed [the Respondent's] policy [for writing people up]" and "I don't know what the policy was." Because there is no evidence that Baldwin was ever made aware of any disciplinary authority or ever exercised it, it cannot be a basis for concluding that Baldwin was a supervisor. Thus, we agree with the judge that the Respondent has failed to establish that Baldwin was a statutory supervisor on the Laird project.

2. Interrogation

The complaint in Case 4–CA–27028 alleges that "[i]n or about mid-March 1998 . . . Respondent, by Charles Wertz, at the Laird Project, interrogated an employee concerning the employee's union membership, activities and sympathies." This allegation refers to incidents described above: Wertz asking Baldwin and Tennet in mid-March why they were wearing union T-shirts and Wertz' subsequent negative remarks about his experience with unions. The judge dismissed the allegation on the grounds that it was "not addressed in the General Counsel or Charging Party's brief" to the judge and was therefore abandoned. The judge also found nothing in the record to indicate that Wertz' comments "restrained, coerced or interfered with Baldwin's Section 7 rights."

[9] Although the Respondent hired employee Steve Tennet, a worker previously recommended by Baldwin, after Baldwin was reassigned to the Laird project, the record evidence is equivocal as to whether Baldwin recommended Tennet before or after he was reassigned. Thus, the record does not establish that Baldwin continued to effectively recommend workers for hire after his reassignment.

[10] Baldwin's crew consisted of a welder, a crane operator with welding skills, and a helper, whose functions on the job were undoubtedly determined in large part by their craft skills. Assigning work to employees on the basis of their known job skills does not require the use of independent judgment. See *Brown & Root, Inc.*, 314 NLRB 19, 21-22 (1994).

[11] Rather, when asked whether Baldwin knew of his authority to discipline, Tigue testified "I would say yes." That testimony does not establish that Baldwin was ever told of his alleged authority; if anything, it suggests the opposite.

While we disagree that the allegation was abandoned,[12] we agree with the judge that it lacks merit.

In evaluating allegations of coercive interrogation, the Board considers the totality of the circumstances presented in each case, including the background of the employer-employee relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984) (known union adherent), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) (not known union adherent). Here, the question about Baldwin's union T-shirt was posed by his immediate supervisor, Wertz, in direct response to Baldwin's demonstration of open union support by wearing the shirt. See *Cardinal Home Products, Inc.*, 338 NLRB No. 154, slip op. at 6–7 (2003). The conversation occurred informally at the work site, in a context free from other unfair labor practices.[13] Wertz' statement that Baldwin did not want to hear his views, but that he could tell stories about his experience with unions on other jobs, while suggestive of a possible personal dislike of unions, was respectful of Baldwin's Section 7 right to support unionization. In addition, it was made only in response to Baldwin's asking whether Wertz had anything against unions. Wertz did not suggest, even indirectly, that any negative repercussion for Baldwin might result from union membership. Nor, in the circumstances, did Wertz's later comment—"What, no union [T]-shirt today?"—carry any negative connotation. There is therefore no basis for finding Wertz' comments coercive. Cf. *Assn. of Community Organizations For Reform Now (ACORN)*, 338 NLRB No. 129, slip op. at 1 fn. 1, 4 (2003) (supervisor's questioning of employees about their support for union, in context of statements that unionization had negative aspects and would "bring [the business] down," constituted coercive interrogation).

3. Termination:

The judge concluded that Baldwin's termination was unlawful. Although he found no direct evidence that the Respondent harbored antiunion animus,[14] he inferred unlawful motivation, in part because he found that the reason proffered by the Respondent—dissatisfaction with Baldwin's work as a foreman, and, in particular, his failure to push his crew to complete work on schedule—was a pretext. The judge also relied on the timing of the discharge, 3 months after Baldwin failed to meet the deadline on the Wanamaker project, and evidence that two other unsuccessful foremen had been treated more leniently than Baldwin.[15] We agree with the judge, for the reasons discussed in his decision. Several other facts support a finding of pretext. First, the delay between the first appearance of the alleged problem in Baldwin's work and his discharge is significant in light of the fact that Baldwin was discharged only 3 weeks after the Respondent learned of his union activity. Second, while the Respondent provided other job opportunities to foremen who failed to meet project deadlines, it discharged Baldwin at a time that it needed pipefitters.[16] Third, Tigue admitted that Baldwin is "very good at what he does" and "knows his trade inside and out."

In exceptions, the Respondent argues that Tigue did not discharge Baldwin immediately after the alleged problem with his work arose because he wanted to give Baldwin another chance. Although the judge did not specifically discredit Tigue's testimony to this effect, we find it unpersuasive in view of the judge's discrediting of

[12] On the contrary, the General Counsel argued this allegation, albeit tersely, in a footnote in his post-hearing brief to the judge (attached to the Respondent's reply brief): "Even under Wertz's account of the one exchange he admits to have occurred [with Baldwin], there was no legitimate purpose for any questioning regarding the shirt . . . Because the two instances of questioning in Baldwin's account were not amicable or casual and were not . . . made in a context free from other unfair labor practices, they rise to the level of violations of Section 8(a)(1) of the Act."

[13] It is true that, 3 weeks after Wertz' comments, Baldwin was unlawfully discharged. However, contrary to Member Liebman, Chairman Battista finds that this subsequent discharge did not retroactively transform Wertz' facially noncoercive comments into an 8(a)(1) violation. Rather, he finds that the single subsequent violation, divorced by time and context, did not convert Wertz' entirely unthreatening comments into statements that would reasonably tend to interfere with the exercise of Sec. 7 rights.

Member Schaumber agrees that he would find no Sec. 8(a)(1) violation in Wertz' comments even if he agreed that the discharge of Baldwin was unlawful.

Contrary to her colleagues, Member Liebman would find that the subsequent unlawful discharge of Baldwin only 3 weeks after Wertz' questioning regarding his union affiliation lends a coercive character to these remarks. See *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000) ("[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone.") In this context, Member Liebman would find that Wertz' questioning violated Sec. 8(a)(1).

[14] Although Wertz made statements to Baldwin about his T-shirt, reflecting his dislike of unions, the judge indicated that these comments did not amount to unlawful interrogation or antiunion animus.

[15] The Respondent excepted to the judge's apparent reliance on the fact that Baldwin was discharged a day after taking a Local 74 welding test to become a member of the Union, because there is no evidence that the Respondent knew about the test. It is not clear that the judge actually relied on this evidence, but we agree with the Respondent that it does not support a finding of unlawful motive.

[16] According to Tigue, one of these unsuccessful foremen, Sam Spangler, was offered work as a regular mechanic while the other, Bryan Roe, was offered work as a basic plumbing mechanic.

Tigue's testimony that he brought the alleged problem with Baldwin's work to his attention. We agree with the judge that the absence of credited evidence that the Respondent ever spoke to Baldwin about his allegedly unsatisfactory performance and the delay in discharging him undermine the Respondent's assertion that the alleged problem was the motivation for his discharge.[17]

II. OLIVER'S LAYOFF

A. Factual Background

In June 1998, the Respondent hired Louis Oliver as a pipefitter on the Laird project. On July 23, Oliver requested a pay increase, and Project Superintendent Wertz granted the request after consulting with Outside Superintendent Tigue. Nonetheless, it appears that there was some conflict between Wertz and Oliver over work-related issues. In addition, Oliver had a fight with another employee, John Cabral, who reported the dispute to management.

On August 13, Oliver contacted the Union and signed an application for membership. There is no evidence that the Respondent knew of Oliver's union activity. On August 28, Wertz terminated Oliver, who was the least senior pipefitter on the Laird job and was still in his probationary period, without explanation. Oliver was not replaced. On September 3, the Union served the Respondent with an unfair labor practice charge arising from Oliver's discharge.

On September 19, the first phase of the Laird project was completed, and several other workers left the Respondent's employ or were transferred to other jobs. In November, the Respondent hired pipefitters for a new phase of another project. Oliver did not reapply for work and was not recalled.

B. Analysis and Conclusions

The judge dismissed the allegation that Oliver's layoff violated Section 8(a)(3). He found that the Respondent gave "shifting reasons" for its action, indicative of pretext, but he declined to infer that the Respondent knew of Oliver's union affiliation and was unlawfully motivated in laying him off. In exceptions, the General Counsel argues that the judge should have inferred knowledge and unlawful motive from the pretextual nature of the Respondent's explanation, the fact that Oliver was the only employee laid off, the Respondent's failure to recall Oliver when it resumed hiring in November, the Respondent's unlawful discharge of Baldwin, and Oliver's frequent conversations at the jobsite with open union supporters. We find no merit in the exceptions.

Initially, we disagree that the Respondent gave "shifting" reasons for Oliver's layoff. Although the Respondent listed several reasons for its action, it did not change its story by giving different reasons on different occasions. Nor is the Respondent's credited explanation—that Oliver was laid off because the Laird project was winding down and he was the least senior pipefitter on the job—inconsistent with the Respondent's other stated reason, that Oliver had difficulty getting along with others. Although the judge rejected the latter contention as undocumented, he, nevertheless, apparently credited testimony supporting it.[18] And, contrary to the judge's finding, the Respondent did not claim that it laid Oliver off because he had "safety problems," another contention that the judge rejected; rather, the Respondent gave that

[17] We agree with the judge that the Respondent's failure to retaliate against other open union supporters does not preclude a finding that Baldwin's discharge was unlawfully motivated. It is well established that an employer's failure to take adverse action against all union supporters does not disprove a discriminatory motive, otherwise established, for its adverse action against a particular union supporter. *Master Security Services*, 270 NLRB 543, 552 (1984). In any event, it is not surprising that the Respondent might have responded less favorably to a demonstration of union support by someone it considers a supervisor—like Baldwin—than by a rank-and-file employee like Tennet, who wore his union shirt at the same time and suffered no adverse action.

Member Schaumber finds that the General Counsel has not shown by a preponderance of the evidence that Baldwin's discharge was discriminatory in violation of Sec. 8 (a)(3). He does not believe the evidence supports a finding of antiunion animus. Thus, in the time period that Baldwin and Oliver were discharged, the Respondent also hired two union members for the Laird project (who worked from the spring of 1998 until they voluntarily left near the project's completion in September 1998), and there is no evidence that the Respondent treated them adversely in any way. Further, even assuming antiunion animus, which he does not, Member Schaumber notes there was substantial delay on both the Wanamaker project and the Laird project and Baldwin was the foreman on the Wanamaker project and in charge of a crew on the Laird project. It is true that 3 months elapsed from the end of the Wanamaker project to the discharge, but in Member Schaumber's view that cannot serve as a predicate upon which to rest a finding of pretext in light of the Respondent's reasonable explanation from two witnesses—that was not discredited by the judge—that it wanted to see if Baldwin's next project was more successful than the Wanamaker project. It was not. He disagrees with his colleagues that discharging Baldwin "only three weeks" after Baldwin exhibited prounion sentiment is evidence of animus. Had it been one day, and in the absence of the above-referenced counter-balancing evidence, would be another matter. Finally, Member Schaumber does not agree that on this record the Respondent's failure to offer Baldwin a job as a pipefitter establishes disparate treatment. While Sam Spangler was rehired as a regular mechanic, he was discharged first. He came back to be rehired and was put to work under "harder foremen." There is no evidence that Baldwin came back, or sought to stay on with the Respondent as a pipefitter, or that he would not have been retained had he done so. Bryan Roe was hired as a mechanic, not as the foreman of a crew like Baldwin, and later given a crew. When he proved unsuccessful at that task, he was returned to being a mechanic.

[18] Thus, the judge credited testimony by a coworker that Oliver had frequent conflicts with Wertz and testimony by Cabral, who had reported a fight with Oliver to management.

reason in explaining why it did not recall Oliver. We therefore conclude, as did the judge, that the Respondent's explanation for Oliver's layoff is not so obviously pretextual as to warrant an inference that the Respondent must have known of Oliver's union affiliation and laid him off for that reason.

The General Counsel argues that the Respondent's knowledge of Oliver's union affiliation must be inferred from the fact that he frequently spoke with open union supporters Lenny Barber and Tennet. But the record shows that all three men worked at the same site, and, according to Oliver, Wertz often sent him to assist Barber and Tennet when they had pipefitting problems. Barber testified that they often discussed work as well as the Union. Even assuming that Wertz observed such conversations, there is no evidence that he overheard them. Under these circumstances, we decline to infer that the Respondent knew that Oliver supported the union, merely because he often spoke with employees who did.

The General Counsel also argues that the Respondent's knowledge of Oliver's union affiliation at the time of his layoff should be inferred from the Respondent's assertedly unlawful failure to recall him. However, the Respondent learned of Oliver's union affiliation about a week after his layoff through a charge filed on his behalf by the Union. Thus, even assuming that the Respondent's failure to recall him when it hired pipefitters several months later was motivated by the discovery of his union affiliation, such a conclusion has no bearing on whether the Respondent knew of Oliver's union affiliation when it laid him off.

In sum, there is no credited evidence that Oliver participated in any open union activity or otherwise openly expressed support for the union; the Respondent's explanation for Oliver's layoff is not clearly pretextual; and the only evidence of animus is the unlawful discharge of Baldwin 5 months before Oliver's layoff. Therefore, we agree with the judge that the circumstantial evidence does not warrant an inference that the Respondent knew of Oliver's union affiliation and that it was unlawfully motivated in laying him off.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Volair Contractors, Inc., Wilmington, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2 (c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Melvin Baldwin, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way."

2. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Plumbers and Pipefitters Local Union 74 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Melvin Baldwin full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges enjoyed.

WE WILL make Melvin Baldwin whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Melvin Baldwin, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

VOLAIR CONTRACTORS, INC.